No. 205.

Br. of Atty. Gen.

for D. C.

Filed Feb. 24, 1902.

Office Supreme Court U. S.
FILED
FEB 24 1902
JAMES H. MCKENNEY,
Clerk

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

EMANUEL FELSENHELD, CLAIMANT OF 288 packages of "Merry World Tobacco," plaintiff in error,
v.
THE UNITED STATES OF AMERICA, DEFENDANT in error.
} No. 205.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR DEFENDANT IN ERROR,

BY

JAMES M. BECK, ASSISTANT ATTORNEY-GENERAL, AND CHARLES J. FAULKNER, SPECIAL COUNSEL FOR THE GOVERNMENT.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

EMANUEL FELSENHELD, CLAIMANT OF 288 packages of "Merry World Tobacco," plaintiff in error,
v.
THE UNITED STATES OF AMERICA, DEFENDANT in error.

No. 205.

BRIEF FOR DEFENDANT IN ERROR,

BY

JAMES M. BECK, ASSISTANT ATTORNEY-GENERAL, AND CHARLES J. FAULKNER, SPECIAL COUNSEL FOR THE GOVERNMENT.

STATEMENT OF THE CASE.

Prior to the 4th of November, 1891, it had been the practice and custom of the manufacturers of smoking tobacco to include in sealed packages of tobacco articles of weight and value (Record, 4), which, by circular No. 371 issued by Commissioner of Internal Revenue Mason, was prohibited (Record, 4). Between 1891 and 1897 the manufacturers of smoking tobacco, under circular No. 371, ceased to include such articles in said packages, *but substituted for them coupons*, which were included in these sealed packages, similar to

those set forth in the information (Record, 2 and 3), as shown by the statement of facts (Record, 9 and 10). This practice seems to have been permitted by the Department, as there was no provision of law prohibiting it.

The attention of Congress being called to this practice (the only one then existing where anything was included in the sealed packages of smoking tobacco), on the 24th day of July, 1897, in what is known as the "Dingley bill," passed a law which will be found as the third clause of the tenth section of said act, amending section No. 3394 of the Revised Statutes of the United States, as amended, as follows:

> None of the packages of smoking tobacco or fine-cut chewing tobacco and cigarettes prescribed by law shall *be permitted to have packed in*, or attached to, or connected with, them any article or *thing whatsoever*, other than the manufacturers' wrappers and labels, the internal-revenue stamp and the tobacco or cigarettes, respectively, put up therein, on which tax is required to be paid under the internal-revenue laws; nor shall there be affixed thereto, or branded, stamped, marked, written, or printed upon said packages or their contents, any promise or offer of, or any order or certificate for, any gift, prize, premium, payment, or reward.

On the 24th day of July, 1897, Commissioner Forman issued a Department circular, No. 106, Internal Revenue No. 477, instructing the collectors of internal revenue in the several districts, among other things, to

notify manufacturers of tobacco of the provisions of the statute heretofore cited, and that a violation of the same would subject the property to seizure. (Record, 5 and 6.)

Commissioner Forman, on August 2, 1897, issued Department circular No. 115, Internal Revenue No. 479, for reasons not stated, modifying his instructions in the previous Departmental circular No. 106, directing that before seizure of the property for violations of this provision of the law the matter should be referred to his office for instructions. (Record, 6).

Commissioner Forman, in his report made to the Secretary of the Treasury, 1897, recommended that this law be amended so as to authorize the Commissioner of Internal Revenue to prescribe, by regulations, what such packages may contain. (Record, 7.)

In February, 1898, Commissioner Scott recommended that this clause of section 10 be amended by authorizing the inclosure in packages of tobacco of coupons similar to the one set out in the information, stating that, under the existing law, the office of the internal revenue did not permit the same to be inclosed (Record, 8), and, subsequently, on the 20th of May, he addressed a letter to a member of the Senate suggesting a further amendment permitting such coupons to be put in packages of tobacco, subject to such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe (Record, 9). No action was taken by Congress modifying the statute as suggested by Commissioner Scott.

On August 6, 1898, Commissioner Scott addressed a letter to the Secretary of the Treasury reviewing this matter, alleging that some of the manufacturers had continued the practice, and suggesting that a test case be brought to determine the legal questions involved. (Record, 10.) Accompanying said letter was a "proposed circular" prepared by the manufacturers themselves, in which they provided, by regulation, the *weight of the article or thing* that could be packed in a package of tobacco. (Record, 10 and 13.) The letter of Commissioner Scott was referred by the Secretary of the Treasury to the Attorney-General, and on August 19, 1898, the Assistant Attorney-General, James E. Boyd, forwarded his opinion to the Secretary of the Treasury in which he expressed the opinion, "this legislation undoubtedly involved several important legal questions which I think should be passed upon by the courts" (Record, 14), and concluded his opinion by the following suggestion: "I would suggest, therefore, that the Commissioner of Internal Revenue cause to be instituted through some one of the collectors, a proceeding by which the validity and scope of this law can be tested by the courts." (Record, 15.)

In pursuance to the suggestion of the Attorney-General's Office, on October 17, 1898, the district attorney filed information against 288 packages of "Merry World Tobacco" and monition issued upon such information, and the property seized by A. B. White, collector of internal revenue for the district of West Virginia, in said district, was attached and taken

into posession by the marshal of said district, April, 1899 (Record, 2).

At the time of the seizure of the said tobacco by the said White, there was in each of said packages a small slip of paper called a coupon, with printed words and figures on both sides thereof, which coupon had been placed within such package at the time when it was packed in the manufactory and prepared for sale (Record, 2.)

At the October term, Emanuel Felsenheld appeared in open court and claimed the said property (Record, 9), and in open court admitted the value of the same to be $54, agreeing that it might be considered of that value for all purposes, and prayed leave to enter into bond in accordance with the practice in such cases (Record, 3).

It was—

> further agreed that for a considerable time before the institution of the present case there had been frequent complaints made to the Government by private persons or corporations, who were interested in the DISCONTINUANCE BY THE DEFENDANT and others of the USE OF SAID COUPONS (Record, 15).

And further—

> it was because of said complaints that the above entitled case was instituted and being prosecuted, and also because of the insistence by private persons or corporations, who were interested in the CONTINUANCE BY THE DEFENDANT and others, in the USE OF SAID COUPONS (Record, 15),

which admission was that the *defendant*, as a *manufacturer*, had packed in said packages said coupons.

That if admissible evidence, the record shows, that in the opinion of Commissioner Mason (Record, 4), Commissioner Forman (Record, 8), Commissioner Scott (Record, 10), and the manufacturers of smoking tobacco (Record, 13), they *regarded that it was necessary* in the *interest of the Government*, either *by law* or *departmental regulations*, that this subject should be controlled and regulated.

> But as to the several documents and expressions of opinion by departmental officers hereinbefore contained, the genuineness of said documents and the fact that such expressions of opinion were made, is admitted, and *not the relevancy of said documents and expressions, nor the truth of any fact stated in them nor the correctness of any such opinions* (Record, 12), and:

On the 4th of April, 1899, an order was entered by which it was agreed between the United States and Emanuel Felsenheld to "*waive any and all formalities and omissions, should any such be found in these proceedings on either side.*" In April, 1900, the case, by agreement of parties waiving a jury, was submitted to the court for its decision and issue joined on the information. At the same time an agreed statement of facts, in writing, signed by the United States district attorney and the attorney for the said defendant, was filed and made a part of the record (Record, 1–14), and the judge, acting in lieu of a jury, rendered his opinion, holding that "the tenth section of the act of July 24, 1897, under which this information was filed, is a constitutional exercise of legislative power by Congress;

that the claimant and defendant willfully and knowingly violated the provisions of said statute by packing in the 288 packages of tobacco seized the coupons described in the record; and that the seizure and attachment for the violation of the provisions of the statute was legal and valid," and judgment of forfeiture was thereupon rendered (Record, 15).

Exception was taken to the ruling of the court and petition filed for a writ of error (Record, 15).

After argument before the circuit court of appeals for the fourth circuit, the court indicated to counsel that in its judgment certain questions should be certified to this court for its determination. Thereupon the following questions were certified (Record, 16):

> **First. Whether the third clause of the tenth section of the act of Congress of July 24, 1897, if the prohibition of that statute be applied to the coupons described in the foregoing statement of facts, was in accordance with or in conflict with the Constitution of the United States.**
>
> **Second. Whether, if the said section be properly construed, the coupons described in the foregoing statement of facts are within its prohibition.**
>
> **Third. Upon the facts stated, was the seizure set forth in the information of the packages of Merry World tobacco therein described, or was the judgment of forfeiture rendered in this case justified under section 3453 of the Revised Statutes?**
>
> **Fourth. Upon the facts stated, was the seizure set forth in the information of the packages of Merry World tobacco therein described, or was the judgment of forfeiture rendered in this case justified under section 3456 of the Revised Statutes.**

Before entering into the discussion of the questions certified by the circuit court of appeals, it is deemed

proper, that the attention of the court should be directed to several suggestions which are apparently relied upon by the plaintiff in error, the solution of which will tend to abreviate the discussion of the questions certified.

It is submitted to the court, that the expressions of opinion by the officers of the Internal Revenue Bureau, as to the wisdom or necessity of the enactment of the third clause of the tenth section of the act of 1897, are not relevant testimony in considering the constitutionality of that enactment.

In determining the constitutionality of the act, the only rule which we are aware of that would justify the court in considering the acts of executive officials is, that which holds, that in cases where the construction of the act is doubtful,

That a long continued construction of the statute adopted and acted upon by executive officers is persuasive on the court in construing the same.

This rule refers to the *acts* of such executive officials upon whom is devolved the duty of acting under such statute, but not to any expression of opinion as to the wisdom or necessity of the enactment; such evidence is clearly irrelevant.

The Government, when it agreed to permit the expressions of opinion of certain officers of the Internal Revenue Bureau to be included in the facts agreed, made the following reservation:

> But as to the several documents and expressions of opinion by the Department officers hereinafter contained, the genuineness of said documents and the fact that said expressions of

> opinion were made is admitted, and not the relevancy of said documents nor the truth of any facts stated in them nor the correctness of any such opinions (Record, 2).

And on page 15 the following reservation is made:

> The right is reserved to either party to object at the hearing to the relevancy of anything contained in this statement.

The constitutional right of the Congress to enact a provision of law, can not be made to rest upon the fluctuating opinions of Commissioners of Internal Revenue, as to the necessity for the regulations, which, in the judgment of Congress, are deemed essential in the enforcement of the collection of the revenue of the Government. No better illustration of the weakness of this position of the plaintiff in error could be shown than in the case at bar. The record shows, that Commissioner Miller approved a provision substantially the same as found in the tenth section. It shows that Commissioner Mason, without authority of law, was compelled to intervene and prohibit the inclosure of articles in packages of tobacco to prevent *fraud* in the collection of the revenue (Record, 4). On the other side, it tends to show that Acting Commissioner Forman, at one time, was in favor of the repeal of this provision so far as it affected the use of coupons (Record, 6 and 7), and Commissioner Scott was in favor of the amendment of the law permitting coupons of certain weight to be included in said packages, provided,

> that in determining the weight of these packages for purposes of taxation, the weight of

> inclosed labels, advertisements, and vouchers shall be included (Record, 9).

But no expression of opinion was given by Commissioner Wilson as to his judgment in reference to this matter, although he was at the time this suit was instituted, and when it was submitted the head of the Internal Revenue Department of the Government.

It must be recognized by the court as an unsound position, that such testimony should be introduced as relevant upon the question submitted for its decision: Had Congress the constitutional power to enact this provision?

If such evidence is relevant to the inquiry submitted to the court for its adjudication, the question would arise in every case in which the constitutionality of a custom or revenue regulation was raised, not whether the act upon its face is constitutional and within the granted powers of the Congress, but whether in the judgment of a subordinate executive official, such regulations were "not absolutely necessary, but appropriate and not prohibited, but really calculated to effect the objects intrusted to the Government," which in this case involves the *weight* of the package (*Hepburn* v. *Griswold*, 8 Wallace, 615), or, as expressed in a different form by Justice Peckham, in 173 U. S., 524:

> Whether the means adopted were the best and most convenient to accomplish that purpose was a question for the judgment of Congress, and its decision must be conclusive in that respect.

Justice Peckham, in this quotation, recognizes the distinct proposition of law, that if Congress has the con-

stitutional power to enact regulations regulating and protecting the collection of the revenue of the Government over a particular subject-matter, that the "means adopted" by the Congress is "conclusive" upon the courts. This decision, one of the latest rendered, cuts up by the roots the proposition of the claimant, that in this case, he can introduce testimony as to the "*degree of necessity*" (12 Wallace, 539) for the enactment of this provision, based upon the judgment of an executive official.

Mr. Russell on page 13 and Mr. Warner on page 25 of their briefs, virtually admit the constitutional power of Congress to exclude from tobacco packages "articles or things," such as, in their construction of this statute, it applies to; and Commissioner Scott, as heretofore quoted, regards it important, if this statute is modified so as to prevent the use of coupons, that the weight of the coupons should be included as a part of the package and taxed as tobacco.

These admissions of the plaintiff in error, through his counsel, that Congress had the right to prohibit *certain articles or things* from being included in packages of tobacco, in our judgment, surrenders the entire contention made in their briefs on this point, as under the decisions of 12 Wallace, 539; 173 U. S., 524; 8 Wallace, 615; and, as stated by Chief Justice Marshall in *McCullough* v. *State of Maryland* (4 Wheaton, 423):

> To undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department and to

> tread on legislative ground. This court disclaims all pretensions to such a power.

This doctrine of Marshall's is fully sustained in 165 U. S., 537, where, in speaking of the oleomargarine law, the court says:

> Protection to purchasers in respect of getting the real and not the spurious article can not be held to be the primary object in either instance, and the identification of dealer, substance, *quantity*, etc., by marking and branding must be regarded as means to effectuate the objects of the act in respect of revenues.

Tobacco is taxed by weight and is put up in packages in quantities prescribed by law.

Can the latter paragraph of the third clause of the tenth section influence the issues presented by the record?

Counsel for plaintiff in error devote much time to the discussion of the constitutionality, and the relation of the last paragraph in the third clause of the tenth section, which reads as follows:

> Nor shall there be affixed thereto, or branded, stamped, marked, written, or printed upon said packages or their contents any promise, or offer of, or any order or certificate for, any gift, prize, premium, payment, or reward.

Although admitting that the Government has always insisted that a judgment of forfeiture of the property described in the information rests upon the violation of the first clause of said section, which reads as follows:

> None of the packages of smoking tobacco and fine-cut chewing tobacco prescribed by law

> shall be permitted to have packed in, or attached to, or connected with them, any article or thing whatsoever, other than the manufacturer's wrappers and labels, the internal revenue stamp and the tobacco or cigarettes, respectively, put up therein, on which tax is required to be paid under the internal-revenue laws.

We will examine the contention made by the plaintiff in error—

First. As to the proper construction to be given to the third clause of the tenth section of the act of 1897; and

Second. Whether the two paragraphs of said clause are so dependent one upon the other that both must stand or fall together.

An examination of this third clause will convince the mind of the court that the Congress, in the enactment of it, had two distinct objects in view, which they expressed in the two paragraphs of said clause:

First. What is the true construction of the first paragraph of the third clause of the tenth section?

An analysis of the first paragraph will show the purpose of Congress to define clearly and explicitly what should constitute a package of smoking or chewing tobacco, which is accomplished by both negative and affirmative provisions.

Three distinct offenses are denounced by the first paragraph of this clause:

1, packing in,
2, attaching to, and
3, connecting with

any

> package of smoking tobacco or fine-cut chewing tobacco * * * any article or thing whatsoever.

The Congress, recognizing the necessities growing out of the character of the business they were legislating in reference to, and that the language used, as above quoted, was sufficiently broad and comprehensive to exclude everything except tobacco, which would have necessarily interfered with the packing of said tobacco in many of the kinds of coverings that were then used in the business, declared affirmatively in the same paragraph what, in its judgment, should constitute such a package, both as to its contents and as to the exterior wrapper:

1, the manufacturer's wrapper,
2, the manufacturer's labels,
3, the internal-revenue stamp, and
4, the tobacco or cigarettes.

The court will observe that this affirmative declaration of what should constitute a package of tobacco limited the comprehensive term used in this paragraph. This paragraph determines clearly and definitely what shall constitute a LAWFUL PACKAGE of tobacco or cigarettes if Congress had the constitutional power to enact the provision.

This paragraph is complete in itself and effectual in carrying out the purposes and objects of the Congress. It is capable of being executed and enforced in accordance with the legislative intent, wholly independent of the second paragraph of said clause.

The first count found in the information rests upon this first paragraph (Record, 1), and the evidence

found in the case agreed, sustains the allegation of the first count, to wit:

> There was in each of said packages a small slip of paper called a coupon, * * * which had been placed within such package at the time when it was packed in the manufactory and *prepared for sale.* (Record, 2.)

What is the true construction of the second paragraph of the third clause of the tenth section?

We can not agree with the views expressed by the counsel for the plaintiff in error in their construction of the second paragraph of the third clause of the tenth section of this act. It provides—

> Nor shall there be affixed thereto, or branded, stamped, marked. written, or printed upon said packages, or their contents, any promise or offer of, or any order or certificate for, any gift, prize, premium, payment, or reward.

The Congress having determined by the first paragraph what shall constitute a *lawful package* of tobacco, proceeds to define a new and distinct offense, not in any way linked to or connected with the first paragraph, but entirely independent of it.

When this paragraph is analyzed, no doubt of the purpose or intention of the Congress, in its enactment, will embarrass the court. Whatever may be thought as to its constitutionality, which, in our judgment, is not involved in the decision of the questions certified to this court, its meaning and purpose is not involved in doubt.

No "promise or offer of, or any order or certificate for any gift, prize, premium payment, or reward" shall be—

1, attached to the package;

2, or branded, stamped, marked, written, or printed upon said package;

3, or branded, marked, stamped, written, or printed on their contents.

The violation of any of these prohibited acts would, if that provision is constitutional, constitute a distinct offense entirely independent of any provision found in the first paragraph.

In the argument submitted by the counsel for plaintiff in error it is only necessary to meet their construction of this paragraph, to refer to the third offense defined by it. It is suggested, why has Congress in the second paragraph provided that "no promise or offer, etc., of any gift, prize, premium payment or reward shall be branded, stamped, marked, written or printed on their contents," if the first paragraph prohibits "any article or thing whatsoever" from being placed in said packages. If the Congress deemed it wise to enact a provision prohibiting such a promise or offer as is described in the statute from being connected with or included in packages of tobacco, and it had the constitutional right to do so, it was necessary to pass this provision constituting this offense, as it had in the first section authorized the packing of the manufacturers' wrapper in said tobacco packages, it would not have been in violation of the first paragraph to have printed upon the manufacturers' wrapper, author-

ized by the first paragraph, the contents found upon the coupons which were packed in the packages seized in this case. The printing upon said wrapper, could not, under any construction, have been construed as violating the provision prohibiting packing in such packages "any article or thing whatsoever."

This illustration draws the clear distinction between the first and second paragraphs, and must satisfy the court that the case at bar falls only within the influence of the first paragraph.

In addition to the manufacturers' wrapper which is permitted under the first paragraph to be placed in the package of tobacco, that paragraph also provides for packages of cigarettes (which are usually wrapped with paper), and this provision of the second paragraph would have prohibited the "branding, printing, stamping, etc., of any promise or offer of any gift, premium, or reward," etc., upon the wrappers of which these cigarettes are made. It might be suggested that this illustration of the legislative purpose could not be true, as printing or stamping a promise or offer upon the paper in which cigarettes are wrapped would be consumed in the use. Those who framed this paragraph were more familiar with the details of the tobacco business than the layman in the methods of the manufacture of cigarettes. Such a promise or offer could have been printed upon said paper to deliver an article based upon the number of empty cigarette boxes or trade-marks of a particular company, when returned to that company.

Second. Are these two paragraphs of said clause so dependent one upon the other that they both must stand or fall together?

We contend that the question of the constitutionality of the offenses described in the second paragraph, will not be passed upon by the court in a case, in which the record shows that the judgment rendered of forfeiture of this property, comes alone within the influence of the first paragraph; that the offense denounced in the first paragraph, is not affected by any provision contained in the second paragraph; that the offense defined in the first paragraph is in no way dependent upon, nor is it modified or controlled by, any provision found in the second paragraph; that the court could, if it deemed right and proper, hold the second paragraph to be an unconstitutional exercise by the Congress of the powers granted to it, and yet it would in no way affect the enforcement of the provisions of the first paragraph, if the court should be of the opinion that it was a constitutional exercise of legislative power. It is immaterial how closely the valid and invalid provisions are shown in the act, if distinct and separable. (*Commonwealth* v. *Hitchins*, 5 Gray (Mass.), 482.)

These two paragraphs not being dependent, conditional, or connected, but being wholly independent of each other, must each be separately tested as to its constitutionality. (*Allen* v. *Louisiana*, 103 U. S., 80; *Pollock* v. *Farmers' Loan and Trust Co.*, 158 U. S., 601.)

We understand the purpose of Congress in the enactment of the first paragraph, was to protect the

Government in the collection of its revenue, laid upon an article in which it had determined that the *weight* of the article taxed, should determine its *rate.*

We assume that the purpose of the Congress in the enactment of the second paragraph, was to prohibit the instrumentalities, which it deemed necessary to employ in the collection of a tax on tobacco, from being made the vehicle or channel "*to assist in the dissemination of matter condemned by its judgment.*" (*In re Rapier* 143, U. S., 145.)

In the discussion of the questions certified by the circuit court of appeals for the fourth circuit to your honorable court for its opinion, we will ask the indulgence of the court to change the order, in which the same were certified, and discuss first the second question asked by said court:

Whether if the said section (referring to the third clause of the tenth section of the act of Congress of July 24, 1897) be properly construed, the coupons described in the foregoing statement of facts, are within its prohibition.

We understand this question to present the inquiry whether, assuming the third clause of the tenth section to be constitutional, it is the opinion of the court that, if properly construed, it would exclude from packing in said packages of tobacco, coupons of the character described in the information.

To sustain the contention of the plaintiff in error, that the proper construction of the first paragraph of the third clause of the tenth section, was not intended by Congress to exclude the packing in packages of tobacco

"coupons or vouchers," counsel have referred to the circulars found in the agreed statement of facts from the Commissioners of Internal Revenue, giving expression to their opinion of the necessity for such legislation, the relevancy of which we have previously discussed.

They further rely upon the case of *Platt* v. *Union Pacific R. R. Co.* (99 U. S., 48), in which the court uses this language:

> All will concede in construing the act of 1863 we are to look at the state of things existing, and in the light then appearing seek for the purposes and objects of Congress in using the language it did. And we are to give such construction to that language, if possible, as will carry out the Congressional intentions.

They also rely upon the case of *Maxwell* v. *Dow* (176 U. S., 581), in which the court in speaking of the construction of a constitutional amendment uses the following language:

> The language of a constitutional amendment should be read in connection with the new condition of affairs out of which the occasion for its adoption may have arisen and then construed * * * so far as it is reasonably possible to forward the known purpose or object.

There is another principle, applied by the courts in the construing of statutes, and which has been fully sustained and acted upon by your honorable court in the case of *Thornley* v. *United States* (113 U. S., 113):

> Where the meaning of the statute is plain it is the duty of the courts to enforce it according

> to its obvious terms. In such a case there is no necessity for construction.

We shall attempt to answer the second question certified, first, by showing that the cases of *Platt* v. *Union Pacific R. R. Co.* and *Maxwell* v. *Dow* are not applicable in the consideration of this question, but that it is controlled by the principle announced in *Thornley* v. *United States*, and, secondly, that if the court looks into—

> "the state of things existing" at the date of the enactment of this law or "to the condition of affairs out of which the occasion for its adoption may have arisen"—

it will be satisfied, that it was the intention of Congress to include "coupons and vouchers" in its prohibition.

Is not the meaning of the statute perfectly plain? Is the language used susceptible of two constructions? Does it not prohibit the *packing in* with smoking tobacco or cigarettes "*any article or thing whatsoever?*" No doubt can exist that the "coupon or voucher" is an "*article or thing.*" Congress, however, to avoid any possibility of misunderstanding upon the part of the executive officers, or the court, if it was necessary to pass upon it, was not satisfied to permit its intention to rest upon a negative prohibition, but deemed it wise to declare affirmatively, the particular "article or thing" which should be included in a *sealed package of tobacco*—first, *manufacturers' wrappers*, and, secondly, the *tobacco* or *cigarettes* inclosed therein. The language of this section leaves nothing for construction.

By providing the articles that may be included, it excludes by necessary intendment, all "articles or things" not mentioned therein.

Should the court, however, not agree with the contention of the Government, that the language of the paragraph is so clear that there is "no necessity for construction," and shall deem it proper in ascertaining the intention of Congress, to "look at the state of things existing" at the date of the enactment of this law, to determine the "purposes and objects of Congress in using the language" referred to, it will find that the facts certified, will demonstrate that the "*state of things existing*" when this statute was enacted will sustain the position taken by the Government, that the main purpose of Congress in its passage was, to exclude from said packages "coupons or vouchers" which are the subject of investigation under this information.

The court will observe that prior to the 4th of November, 1891, it was the practice of manufacturers of smoking tobacco to include in sealed packages many foreign articles (Record, 4) such as pocketknives, photographs, or other similar things (Record, 11); that on that date, Commissioner Mason, realized the importance of excluding such "foreign articles" from sealed packages of tobacco, that the weight provided by law should correspond with the stamp required to be placed upon the package, directed the collectors to notify the manufacturers of that ruling. This action of the Commissioner was taken without any direction from Congress. An abuse had grown up which, in his

judgment, it was necessary to correct under the implied authority that a package of tobacco means a package containing tobacco and nothing else. The circular he issued was as follows:

> Manufacturers of tobacco, in marking the gross, tare, and net weight of packages of tobacco, should include in the gross the full weight of the package and all its contents. The tare should include the weight of the pail, lining, covering, etc., so that the tare subtracted from the gross will give the net weight of the tobacco contained therein and expressed by the stamp. Great care should be exercised by the collectors to prevent foreign articles of any kind being included in any of the packages. A practice has grown up, which seems to be on the increase, by which manufacturers have included in statutory packages many foreign articles. This practice should be discontinued. A PACKAGE OF TOBACCO MEANS A PACKAGE CONTAINING TOBACCO AND NOTHING ELSE.

This circular, which at that time struck at the only evil existing, which was packing in these sealed packages knives, photographs, and similar articles, was sufficiently broad, however, in its language to exclude "coupons and vouchers." A short period after issuing this circular No. 371, Commissioner Mason modified its language, as the counsel for plaintiff in error says (Mr. Warner's brief, p. 24), by interpreting the word "article" to embrace "articles of merchandise" (Record, 11). From 1891 to the passage of this act, in 1897, the manufacturers ceased to include "articles of

merchandise" in said packages, *substituting coupons* (Record, 2–3, 9–10). This practice was permitted by the Department during six years, *there being no provision of the statute prohibiting it.* The purpose of Congress in the original enactment is further shown by its refusal to yield to the suggestion of an amendment limiting the language used in the act (Record, 8 to 13, inclusive). Four sessions of Congress have passed, since its enactment, and yet it remains undisturbed as passed in July, 1897. The construction of this statute by the Commissioner of Internal Revenue is shown by circular 106, Internal Revenue No. 477, to be in accord with the contention of the Government (Record, 6), and this action of the Department, as to its construction of the law, has never been withdrawn by it (Record, 8).

The facts agreed present to the court this condition of affairs as existing on the 24th of July, 1897, when this law was passed: First, that the only "articles or things" then included in a sealed package of smoking tobacco or cigarettes were "coupons or vouchers" similar to those set up in this information; second, that the word "article," as used in circular No. 371, issued by Commissioner Mason November 4, 1891, had been construed by the Department to prohibit the packing in said packages of tobacco "articles of merchandise;" and, third, explains the reason for the additional words used by Congress, "or things whatsoever," thus leaving the construction of the Commissioner of the word "article" to stand, and broadening his ruling to remove the abuse then existing of packing "coupons or vouchers" in the sealed packages.

The wisdom and necessities for this action of Congress is fully sustained by the agreed statement of facts contained in the record.

The question of difference, if any, between Congress and the Internal Revenue Bureau has not been, as to the *necessity* of having a law or regulations to control the *packing in* of *sealed packages* of tobacco *extraneous articles or things*, but only the *extent* to which that law or regulation should go. Should it, as provided by Congress, exclude all extraneous "articles or things whatsoever," or should it be limited, by permitting "articles or things" of inappreciable weight to be included in a sealed package of tobacco? If Congress had adopted the latter view, and not excluded all things except such as were necessary in carrying on the trade, the counsel for plaintiff in error (Mr. Russel, on p. 13, and Mr. Warner, on p. 25, of their briefs), would have admitted the constitutionality of this enactment. Congress, however, must have been of the opinion, that the *proper means* to reach the evil and protect the revenue was, not by classifying the foreign articles or things that should be included in a package, but prohibiting *all* such articles not necessary in carrying on the trade in smoking tobacco.

Commissioners Scott and Foreman who did not fully agree with Congress as to the necessity of this provision of the statute, recognized, however, its validity, and concurred in the opinion, that it was necessary to enact a law, or to promulgate a regulation, that should govern and control the subject (Record, 8, 9). Commissioner Scott, in a communication to the Secretary

of the Treasury recommended that certain regulations should be issued by the Department to regulate the use of coupons and vouchers. Under what authority he suggested these regulations we are unable to state, but that in his judgment such regulations were necessary to protect the revenue, should "coupons or vouchers" be permitted to be inclosed in such packages, there can be no doubt (Record, 9).

The difficulty of regulating this subject by law is shown by the recommendations made by the Commissioner. He recommended, first, that nothing should be contained in the package that appreciably increased the size of the package, or that weighed more than one one-thousandth of a pound; second, that no advertisements, or anything in any way in aid of any lottery or other scheme involving chance or hazard; third, anything of a pictoral nature, except manufacturers' trademarks, labels now permitted on the outside of packages, and, fourth, that the *weight of coupons should be taxed as part of the weight of the tobacco.*

This illustration of the views of the Commissioner shows, that in the opinion of the Department, there existed a necessity for the regulation of this subject, with a view of protecting the Government in the collection of its revenue. Even the manufacturers of tobacco, in their proposed circular (Record, 9, 11, 13), fully agreed with the Commissioner as to the *necessity* for a regulation of "coupons and vouchers" if permitted to be inclosed in said packages (Record, 13).

We therefore find that Congress, the Internal Revenue Bureau, and the manufacturers of smoking to-

bacco and cigarettes, all concur in the opinion, that it was necessary and proper in the public interest, and that this subject-matter should be controlled by law or administrative regulations.

The judgment of Congress, however, as shown by its enactment, was that as the article was taxed by weight, the only safe and *proper means* by which the revenue could be protected, was to exclude *all extraneous matters* except the manufacturer's wrapper, which was allowed as incident to the putting up of the tobacco in the character of packages prescribed by law.

We conclude, therefore, that Congress in passing the first paragraph of the third clause of the tenth section intended its prohibition to include the "coupons or vouchers" set forth in the information and the agreed statement of facts; that no other construction under the language of the law and the conditions surrounding the subject at the date of its enactment can be given to said paragraph.

Having presented the view of the Government, in reference to the purpose and intention of Congress to include, as within the prohibitions of the first paragraph of the third clause of the tenth section of the act of July 24, 1897, "coupons or vouchers," we will proceed to discuss the first question submitted by the certificate of the circuit court of appeals for the determination of this court:

1. "Whether the third clause of the tenth section of the act of Congress of July 24, 1897, if the prohibition of that statute be applied to the coupons described in the foregoing statement of facts, was in accordance with or in conflict with the Constitution of the United States."

The information filed by the district attorney of the United States for the district of West Virginia rests upon the following provisions of the statute:

> None of the packages of smoking tobacco and fine-cut chewing tobacco prescribed by law shall be permitted to have packed in, or attached to, or connected with them, any article or thing whatsoever, other than the manufacturer's wrappers and labels, the internal-revenue stamp and the tobacco or cigarettes, respectively, put up therein, on which tax is required to be paid under the internal-revenue laws.

A brief statement of the history of this enactment by Congress may not be inappropriate. Embodying this provision as an amendment to section 3394 of the Revised Statutes was not the result of a sudden whim or caprice upon the part of the legislature. The necessity for its enactment had been brought to its attention, and especially to the consideration of the Ways and Means Committee, first, by a joint resolution presented by Mr. Evans, and, secondly, by a bill offered by Mr. Cummings during the first session of the Fifty-fourth Congress, which joint resolution and bill, upon inspection, will be found to contain in substance similar prohibitions.

Delicate duty of the court.

In exercising the delicate constitutional duty of passing upon the validity of an act of a coordinate branch of the Government, the court can not be influenced in its action by the questions whether or not the act, in

the opinion of the judge, is one which will operate according to natural justice, nor, as stated in *Ex Parte McCardell* (7 Wallace, 574), is the "court at liberty to inquire into the motives of the legislature?" We can only examine its power under the Constitution.

> Cooley's Cons. Limitations, chap. 7, secs. 4, 5, 6.
> *Commonwealth* v. *McCloskey*, 2 Rawle, 374.
> *Fletcher* v. *Peck*, 6 Cranch, 87.
> 8 Wallace, 548.

In the latter case Chief Justice Chase uses the language:

> The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not in the courts, but to the people by whom its members are elected.

Nor can the court overlook that other important rule of constitutional interpretation, sustained so fully in all our adjudications, that it becomes the duty of the judge in construing the laws of Congress, wherever consistent with their context and language, to uphold their constitutionality.

> *Presser* v. *Illinois*, 116 U. S., 252.
> *Parsons* v. *Bedford*, 3 Pet., 433.
> *United States* v. *Coombe*, 13 Pet., 72.
> *Grenade Co.* v. *Brown*, 112 U. S., 261.

Is the third clause of the tenth section, if construed to embrace coupons or vouchers, constitutional?

It is admitted as an undisputed proposition of constitutional law, that the Government of the United States is one of enumerated and defined powers, whose

limits are prescribed and whose powers are distributed between the three coordinate departments. To the Congress has been committed, by its terms, all legislative power. When a law of Congress is assailed, we must therefore look to the National Constitution, to see if the grant of power is broad enough to embrace it. But, as stated by the Chief Justice, in *Hepburn* v. *Griswold* (8 Wallace, 613):

> It is not necessary, however, in order to prove the existence of a particular authority to show a particular and express grant. The design of the Constitution was to establish a government competent to the direction and administration of the affairs of a great nation, and, at the same time, to mark, by sufficiently definite lines, the sphere of its operations. To this end it was needful only to make express grants of general powers, coupled with a further grant of such incidental and auxiliary powers as might be required for the exercise of the powers expressly granted.

The only limitation to the exercise of the "incidental and auxiliary powers," expressed by the Constitution itself, is found in that clause which provides, the "power to make all laws necessary and proper for carrying into execution the powers expressly granted to Congress or vested by the Constitution in the Government, or any of its departments or officers."

Although, under our constitutional system, each of the coordinate branches of the Government are entirely separate and independent of the other, yet it has frequently been necessary for the judicial department

to review the action of the Congress, as its action affected the right of the citizen, and, if repugnant, to declare that action in conflict with the grant of power. This has never been done, however, in doubtful cases, or unless upon clear and strong convictions upon the part of the courts, that the act was beyond the powers conferred. Even then it has been done with great reluctance. As stated by Chief Justice Marshall, in the case of *Fletcher* v. *Peck* (6 Cranch, 128):

> The question, whether a law be void for its repugnancy to the Constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. * * * The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.

And Justice Strong, in announcing the opinion in the *Legal Tender Cases* (12 Wallace, 531), approving the quotation just given, adds:

> It is incumbent, therefore, upon those who affirm the unconstitutionality of an act of Congress to show clearly that it is in violation of the provisions of the Constitution. It is not sufficient for them that they succeed in raising a doubt.

The same view has been taken by Chief Justice Chase, in the well-considered opinion of *Veazie Bank* v. *Fenno* (8 Wallace, 548), where, in discussing the tax of 10 per cent on State banks, he answers this question: "Is the tax so excessive as to indicate the

purpose on the part of Congress to destroy the franchise of the bank, and is, therefore, unconstitutional?" He replies:

> The first answer to this is that the judicial can not prescribe to the legislative departments of the Government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not in the courts, but to the people by whom its members are elected.

All the decisions of the Supreme Court, when treating of the duty of the judiciary, in considering the constitutionality of an act of Congress, rest their reasoning upon the application of the principle announced by Chief Justice Marshall in the case of *McCulloch* v. *State of Maryland* (4 Wheaton, 423), from an examination of which it is easy to see that in the discussion of the subject he had in mind both the express grants as well as the "incidental and auxiliary" grants of power:

> Where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the Government, to undertake here to inquire into *the degree of its necessity*, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.

and (4 Wheaton, 421):

> Let the *end* be legitimate, and within the scope of the Constitution, and all *means* which

> are appropriate, which are plainly adapted to that end, and which are not prohibited.

may constitutionally be employed to carry it into effect.

This latter quotation is but a different way of stating the same proposition by the same distinguished judge, as found in the case of *United States* v. *Fisher* (2d Cranch, 396), in which he says:

> Any means which are in fact conducive to the exercise of a power granted by the Constitution.

and again in the case of *McCulloch* v. *The State of Maryland*, he enlarges the language made in the quotation from that case by using the language, "*any means calculated to produce the end.*"

No clearer announcement of this principle has been made than that found in the civil rights case (p. 51, 109 U. S.) by Justice Harlan:

> But it is for Congress, not the judiciary, to say that legislation is appropriate—that is, best adapted to the end to be obtained. The judiciary may not, with safety to our institutions, enter the domain of legislative discretion and dictate the means which Congress shall employ in the exercise of its granted powers. That would be sheer usurpation of the functions of a coordinate department, which, if often repeated and permanently acquiesced in, would work a radical change in our system of government.

This but reiterates in different language the doctrine as declared by Marshall in 4 Wheaton, 421, in which he says:

> The sound construction of the Constitution must allow to the national legislature *that discretion*, with respect to *the means by which the powers which it confers are to be carried into execution*, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people.

This principle was further approved by the court in its exact language (12 Wallace, 539), and the court in that case concluded the discussion of the principles that would affect the constitutionality of the act, and of its duty under such circumstances, in the following language:

> Before we hold the legal-tender act unconstitutional, we must be convinced that they were not appropriate means or means conducive to the execution of any or all of the powers of Congress, or of the Government, not appropriate in any degree (*for we are not judges of the degree of appropriateness*), or we must hold that they were prohibited.

This extract from the opinion of the court in the legal-tender cases is but a reaffirmation found in the case of *Hepburn* v. *Griswold* (8 Wallace, 615), in which the court in construing the language found in the Constitution, "All laws necessary and proper for carrying into execution," uses this emphatic language:

> It must be taken, then, as finally settled, so far as judicial decisions can settle anything, that

> the words 'all laws necessary and proper for carrying into execution' powers expressly granted or vested have, in the Constitution, a sense equivalent to the words, laws *not absolutely necessary indeed*, but appropriate, plainly adapted to constitutional and legitimate ends; laws not prohibited, but consistent with the letter and spirit of the Constitution; laws really calculated to effect the objects intrusted to the Government.

In the opinion delivered by Justice Peckham (173 U. S., p. 314):

> It is always an exceedingly grave and delicate duty to decide upon the constitutionality of an act of the Congress of the United States. The presumption, as has frequently been said, is in favor of the validity of the act, and it is only when the question is free from any reasonable doubt that the court should hold an act of the law-making power of the nation to be in violation of that fundamental instrument upon which all the powers of the Government rest. This is particularly *true of a revenue act of Congress.* The provisions of such an act should not be lightly or inadvisedly set aside, although they be plainly antagonistic to the Constitution it is the duty of the court to so declare. The power to tax is the one great power upon which the whole national fabric is based. It is as necessary to the existence and prosperity of a nation as is the air which he breathes to the natural man. It is not only the power to destroy, but it is also the power to keep alive.

And further, on page 524, he says:

> Instead of a memorandum, Congress might have required a sworn report, with the proper amount of stamps thereon, to be made at certain regular intervals, of all sales made subject to the tax. *Other means might have been resorted to for the same purpose. Whether the means adopted were the best and most convenient to accomplish that purpose was a question for the judgment of Congress, and its decisions must be conclusive in that respect.*
>
> The means actually adopted do not legally interfere with or obstruct the internal commerce of the States, nor are such means a restraint upon that commerce so far as to render the means adopted illegal. That Congress might have adopted *some other means of collecting the tax which would prove less troublesome or annoying to the taxpayer can surely be no reason for holding that the method set forth in the act renders the tax invalid.* As it has the power to impose the tax, *the means to be adopted for its collection within reasonable and rational limits must be a question for Congress alone.*

Principles applied to the facts of the case.

In considering these authorities and applying the principles which they lay down, the court should remember that in the 3362 section of the Revised Statutes as amended, all smoking tobacco is required to be put up and prepared "*in packages containing 2, 4, 8, and 16 ounces each;*" that by an amendment in the war-revenue law of 1898 the packages were reduced in weight to

$1\frac{3}{3}$, $2\frac{1}{2}$, $3\frac{1}{3}$, and a new provision made for a 1-ounce package. That smoking tobacco is taxed by package according to its weight, and that the stamp of the Government is evidence of the weight of the tobacco—not the weight of the package, but *the weight of the tobacco contained in it.* Had the Government the right, in the administration of this law and for its efficient enforcement, to prevent any article from being inclosed within a sealed package, which would have increased the weight of the package containing the taxable subject? Had it the right to provide that no article of greater weight than one-tenth of an ounce, or of any other weight, should be inclosed within the sealed package? If it had the right to legislate against increasing the weight of the contents of a package, so as to exclude articles of a given weight being packed therein, can there be a question that it had the right to exclude all substances, except that which was the subject of taxation from being placed therein?

If the Government was under the necessity, in sustaining the constitutional power of Congress to enact this provision, to rely upon the "incidental and auxiliary powers" found in the Constitution, and not upon an express grant of power, it seems to us, we should have little difficulty in convincing the court that the question presented by this record is not one of *power*, but one of *policy* or *expediency.* To declare this law unconstitutional, the court must hold that it was not "necessary or proper" in carrying into execution *any grant of power* to Congress. It must be prepared to say that the "means" employed by Congress were not

"*adapted to the end*" which Congress had in view, the efficient administration of a constitutional impost; that the "means" adopted were not "means calculated to produce the end," to wit, *the true weight of the subject of taxation.*

The personal opinion of the individual composing the court, as to its appropriateness to accomplish the purpose of Congress, can not be substituted for the express judgment of Congress.

Congress has the right to select the means.

Is the court prepared to say, in the language of Marshall, that it "feels a clear and strong conviction" that as an administrative measure it was not within the power of Congress to *consider this means*, among others, to enforce the *correct weight of the contents of the subject to be taxed contained within the sealed packages? Weight*, and that alone, is the basis on which the *tax* of the Government is determined. Has it not the right to guarantee the correctness of this basis? Is the court prepared to say that the method adopted by Congress should not have been considered by it as a "means calculated to produce the end"—to prevent the fraudulent underweight of the subject of taxation contained in these sealed packages—and therefore it is repugnant to the Constitution? If the court can not hold that the "means" adopted by Congress as an administrative measure to effectuate the exercise of a constitutional power, *was not excluded from its consideration*, it must admit the right of Congress to *select this means* for the enforcement of the exercise of a

constitutional power. Within this limitation the legislature is certainly supreme. It is, then, not a question of *power*, but, as I have stated, of *selection*, of *policy*, of *expediency*. To urge the courts to enter this field is to request that it shall do that which so early in our history was repudiated by Chief Justice Marshall when he stated that it would be to "pass the line which circumscribes the judicial department and tread on legislative ground."

As decided by Justice Peckham (173 U. S., p. 524):

> Instead of a memorandum, Congress might have required a sworn report, with the proper amount of stamps thereon, to be made at certain regular intervals, of all sales made subject to the tax. Other means might have been resorted to for the same purpose. Whether the means adopted were the best and most convenient to accomplish that purpose was a question for the judgment of Congress, and its decisions must be conclusive in that respect.
>
> The means actually adopted do not legally interfere with or obstruct the internal commerce of the States, nor are such means a restraint upon that commerce so far as to render the means adopted illegal. That Congress might have adopted some other means of collecting the tax which would prove less troublesome or annoying to the taxpayer can surely be no reason for holding that the method set forth in the act renders the tax invalid. As it has the power to impose the tax, the means to be adopted for its collection within reasonable and rational limits must be a question for Congress alone.

The object and purpose of the act.

The "*purpose and end*" of this statute is to raise revenue for the support of the National Government by imposing a tax upon smoking and other tobacco, and to provide such regulations as in the judgment of Congress will protect the revenue and enforce the collection of the taxes levied. This being the object, the power of Congress is found in the first article, section 8, of the Constitution, which provides: "The Congress shall have the power to lay and collect taxes, duties, imposts, and excises." This is an express grant of power. There is no limitation upon this grant of power that can affect the case at bar, nor is there any question raised by the defendant as to the right of Congress to tax the contents of these packages. The sole and only defense offered is, that in providing the regulations for the enforcement of this grant of power, Congress has employed "means" which, in the judgment of the defendant, are repugnant to the Constitution. But, as Chief Justice Chase said in the case of *Hepburn* v. *Griswold*, that in carrying out the powers conferred upon Congress it did not depend upon whether the law was "*absolutely necessary, but appropriate*," and "*not prohibited*," but a law really calculated to effect the object intrusted to the Government.

Chief Justice Fuller, in the case of *In re Kollock* (165 U. S., pp. 536, 537), said:

> The act before us is on its face an act for levying taxes, and although it may operate in so doing to prevent deception in the sale of

oleomargarine as and for butter, its primary object must be assumed to be the raising of revenue. And considered as a *revenue act* the designation of the stamps, marks, and brands is merely in the discharge of an administrative function and falls within the numerous instances of regulations needful to the operation of the machinery of particular laws, authority to make which has always been recognized as within the competency of the legislative power to confer.

Protection to purchasers in respect of getting the real and not the spurious article can not be held to be the primary object in either instance, and the identification of dealer, substance, *quantity*, etc., by marking and branding must be *regarded as means to effectuate the objects of the act in respect of revenue.*

Illustrations of the necessity, in the judgment of Congress, for stringent regulations similar to those enacted in the first paragraph of the third clause of the tenth section of the act of 1897, made with the object of facilitating the collection of the tax imposed, and to prevent frauds upon the revenue.

By an examination of the questions hereinafter referred to, the court will realize at once that the enactment of the law under discussion was not a departure in revenue legislation. It will be found to follow in the beaten track that has been marked by many similar statutes:

Act of August 27, 1894, section 68; the following sections of the Revised Code; sections 3362, 3363, 3364, 3381, 3384, 3387, 3392.

An act passed by Congress after the fullest discussion found in the 29th Statutes at Large, 604, entitled "An act to allow the bottling of distilled spirits in bond," illustrates the case at bar, and the views which Congress had of its power over these taxable subjects. The prohibitions found in that act are equally as effective as those found in the tenth section.

Some adjudicated cases.

The Revised Statutes require that before any package of either liquor, cigars, chewing or smoking tobacco are sold there shall be placed upon them the stamp provided by law. In the case of *United States* v. *Keys* (10 Fed. Rep., 876), the court held that the payment of that tax without putting the stamp upon the package was not a compliance with the law, and in discussing the statute used this language:

> The Government has imposed a tax on all kinds of manufactured tobacco, even refuse, scraps, and sweepings; *having required it to be put up in a particular way or ways*, and to be stamped with stamps for the payment of the tax, and the stamps canceled; and have imposed this penalty, not for having in possession manufactured tobacco on which the tax had been paid, but manufactured tobacco on which stamps have not been placed and canceled. Congress has as much power to say the tax shall be paid in a particular way—that is—as it has to impose any tax, *and all its requirements* in that behalf *must be complied with.*

In the case of *United States* v. *Jacobi* (12 Blatch., 491),

the court, in passing upon section 3397 Revised Statutes, which prohibits the putting on of any "stamp in the similitude or likeness of any other stamp required to be used, * * * whether the same be a custom or internal-revenue stamp," held that the indictment for this offense did not involve the question whether the tax was paid or not, but the question of fraud upon the public.

Justice Caldwell, in delivering the opinion in the case of *United States* v. *133 Packages of Spiritous Liquors and Wines* (22 C. C. A., 228), in passing upon section 3449 Revised Statutes, "prohibiting the shipment, transferring, or receiving of liquors or wines under any than the *proper name* or *brand known to the trade* as designating the *kind* or *quality* of the contents of the packages," said:

> The contention of the learned counsel for the claimant, that this section is nothing but a trade-mark regulation, is not tenable. It is one of the numerous regulations prescribed by the internal revenue law, intended to prevent frauds on the revenue in the manufacture, removal, shipment, and sale of distilled spirits and other liquors, and to aid in the detection of such frauds. The regulations for this purpose are very extensive and extremely minute. They embrace every step in connection with the manufacture and handling of spirits, from the introduction of the raw material into the distillery down to the rectification of the product and its removal, shipment, and sale. * * * Before any court would be authorized to hold

an act of Congress obsolete and inoperative it would have to appear conclusively that it was totally *inoperative for any lawful or useful purpose. When the statute relates to a subject-matter within the constitutional competency of Congress to legislate upon, the presumption is that it serves a useful purpose.* When a statute is susceptible of two constructions, one which would render it valid and operative, and the other to press it beyond the constitutional competency of Congress to enact, or render it inoperative, the former construction will be adopted. The section is *none the less a revenue regulation* because its enforcement may *tend to discourage the piracy of trade-marks, and prevent frauds upon those who consume the contents of the packages. These are mere incidents of the statute and not its primary object.* Congress has an undoubted right to legislate to prevent frauds upon the public revenue, and the validity of such legislation is not affected by the fact that it incidentally tends to the discovery or suppression of private frauds.

Should the court sustain the principle upon which rests the contention of the plaintiff in error, its decision would tend to render uncertain and doubtful many of the provisions of the custom and internal-revenue laws which are regarded as necessary in the collection of the revenue.

After a full review of the authorities to which I have referred, bearing on the constitutionality of an act of Congress, the object of which is to put in force and give effect to an express grant of power, and applying the well-recognized rules of constitutional interpretation

as to what are "proper and necessary laws" which, as stated by Marshall, is the exercise of discretionary power by Congress in the employment "of means not prohibited, but which are really calculated to effect the objects intrusted to the Government," we can not perceive how the law, now under consideration, could be other than valid. Under our complicated system of internal taxation, the rights of the third party would be most seriously affected unless Congress was at liberty to make stringent provisions for their administration and enforce strict compliance with the same. All similar provisions, when submitted to the test of judicial criticism, have been upheld. Should the contention of the plaintiff in error be sustained in this cause, the principle upon which the court's decision must rest would necessarily throw into chaos and confusion the administration of both the internal-revenue and the custom laws of the country. We are at a loss to perceive upon what theory the court would base a decision that this clause of the tenth section of the act of July 24, 1897, was unconstitutional and void.

Packages of smoking tobacco, under the law of Congress, are taxed by weight, and the stamp of the Government is intended, and, in fact, does, in the mind of the public, fix and determine that question. Being sealed, to allow extraneous substances, of whatever character, to be included within the package, and thus by negligence or fraud reduce the weight of the contents, would make the Government a *particeps criminis* in the fraud perpetrated upon the public. Having a

right to tax the subject-matter; having the right to prescribe the size and weight of contents; having the right to provide that no sale shall be made except in original and full packages, as put up under the provisions of law; having the right, as decided in the case of *In re Rapier* (143 U. S., 110), to prevent the facilities furnished by any of its departments from being used for improper purposes, can there be any question in the mind of the court that the prohibition contained in the first part of the third clause of the tenth section is a constitutional exercise of the powers conferred upon the Congress, and is, therefore, valid?

The illustrations which we have given show, that when the Government has once taken possession of a subject for the purpose of exercising its grant of power to tax the same, that its policy, as manifested by its enactments, has been, first, to execute its powers of taxation; second, to guard against frauds upon the revenue, and third, to prevent any possibility of its being made a participant in a fraud upon the public through the use of the "means" which it has found necessary to employ in carrying out those powers.

The third question asked of your honorable court is:

3. Upon the facts stated, was the seizure set forth in the information of the packages of Merry World tobacco therein described, or was the judgment of forfeiture rendered in this case justified under section 3453 of the Revised Statutes?

In answer to this question the Government would submit:

1. That the agreement of counsel removed this question from the consideration of the court below;

2. That under the proceedings in the case, the question of seizure could not have been considered by the court below and will not be by this court;

3. That section 3453 denounced against the offense the penalty of forfeiture; and

4. That the seizure was properly made under said section.

First. That the agreement of counsel removed this question from the consideration of the court below.

The following consent agreement was entered in this case of the 1st day of July, 1899:

> And the said district attorney and the said claimant, by his counsel, respectively, waive any and all informalities and omissions, should any such be found in these proceedings on either side.

The Government had been liberal with those who had been violating this law, anxious not to enforce its penalty until its validity and extent was passed upon by the judicial department of the Government. For that reason it did not seek to seize all of the tobacco that was forfeited by reason of this statute, but selected a manufacturer who had a small amount, that a test case could be made with as little inconvenience to the citizen as possible. We have understood that for this reason this consent order was entered; that the merits of the case could, without legal quibble or technical reliance, be brought before the court for its consideration and judgment.

Second. That under the proceedings in this case, the question of seizure could not have been considered by the court below and will not be by this court.

This was a proceeding *in rem*, to subject to forfeiture the property, the subject of taxation, which had been packed in fraud of the provisions of the internal-revenue law.

As decided by Justice Swain, in the case of *Cliquot's Champagne* (3 Wallace, 145):

> Revenue laws are not penal laws in the sense that requires them to be construed with great strictness in favor of the defendant. They are rather to be regarded as remedial in their character, and intended to prevent fraud, suppress public wrong, and promote the public good. They should be so construed as to carry out the intention of the legislature in passing them and most effectually accomplish these objects.

Justice Story, discussing a similar statute, in the case of *Wood* v. *The United States* (16 Peters, 359), after approving the instructions of the district judge, "that no question in relation to the mere seizure of the goods is in issue, or material under the pleadings in this case," proceeds to observe:

> It is of no consequence whatsoever what were the original grounds of seizure, whether they were well founded or not, if, in point of fact, the goods are by law subject *to forfeiture;* for the the United States are not bound by the acts of the seizors to the causes which influenced them in making the seizure, nor by any irregularity

on their part in conducting it, if, in point of fact, the seizure can now be maintained, as founded upon an *actual forfeiture thereof at the time of seizure.*

Third. That section 3453 denounced against the offense the penalty of forfeiture; and

Fourth. That the seizure was properly made under said section.

We will discuss the third and fourth propositions together, as they involve the construction of the same statute. It is as follows:

> All goods, wares, merchandise, articles, or objects, on which taxes are imposed, which shall be found in the *possession or custody*, or within the *control* of any person for the purpose of being *sold or removed by him in fraud of the internal-revenue laws*, or with design to avoid payment of said taxes, may be *seized* by the *collector* or *deputy collector of the proper district* or by *such other collector or deputy collector* as may be *specially authorized by the Commissioner of Internal Revenue* for that purpose, and shall be forfeited to the United States. The proceedings to enforce such forfeitures shall be in the nature of a proceeding *in rem* in the circuit court or district court of the United States for the district where such seizure is made.

The facts, as shown in the case agreed, are that these packages containing the "coupons or vouchers" were packed by the Merry World Tobacco Company, of Wheeling, W. Va., in the "manufactory and pre-

pared for sale;" that the promise was made that the purchaser had bought a definite share in any of the articles mentioned on the voucher (Record, 2); that Emanuel Felsenheld claimed the ownership of said tobacco which had been seized.

These facts being established, there was shown upon the part of the United States, if the first paragraph of the third clause of the tenth section is constitutional, *probable cause* for the present prosecution, and Judge Story, in deciding the case of *Wood* v. *The United States* (16 Peters, 366), observes that—

> probable cause must, in this connection, mean reasonable ground or presumption that the charge is, or may be, well founded.

If, therefore, the plaintiff in error relied upon any defense, in reference either to forfeiture or seizure of these goods, the burden of proof was upon him This view is fully sustained in *Cliquot's Champagne* (3 Wallace, 343–344), the court closing the discussion of the question of the *onus probandi* with the following remarks:

> The applicability of the rule alike in cases arising under all the revenue laws was assumed by the eminent counsel concerned and by the court. * * * This tacit recognition is equivalent to an express declaration.

In the case of the *United States* v. *580 Barrels of Distilled Spirits* (5 Blatch., 410), the court, in discussing this question, says:

> We are inclined to think that upon the seizure of the goods for an alleged violation of law,

> if the complainant relies upon a conformity with it as a defense, he is bound to establish the affirmative by proof; that it would be unreasonable and not consistent with the rules of evidence to call on the Government to establish a negative. The means of furnishing the evidence are in the possession of the claimant. * * * The adoption of the seizure by the Government cures any defect in this respect.

If the contention of the Government is correct, that the Congress had the right to prohibit, under the penalty of seizure and forfeiture, the packing in these packages of tobacco the "coupons or vouchers" set out in the information; that in the exercise of that constitutional power, the Congress expressed its judgment by this enactment; that the packages of tobacco put up in *fraud of the revenue law* were in *possession* or *custody* or within the *control* of any person; that they were not claimed by the Merry World Tobacco Company, but by one Emanuel Felsenheld, the conclusion under the decisions as to the *onus probandi* rests upon the defendant, the facts agreed were sufficient to show that they were removed in fraud of the internal-revenue law, and the right of seizure and forfeiture, under section 3453 of the Revised Statutes, can not be questioned.

4. Upon the facts stated, was the seizure set forth in the information of the packages of Merry World tobacco therein described, or was the judgment of forfeiture rendered in this case justified under section 3456 of the Revised Statutes?

If for any reason that might be suggested to the mind of the court, the seizure and forfeiture of this property is not valid under section 3453, which we

have discussed, can there be a doubt of the forfeiture of the property under section 3456 of the Revised Statutes and the right to seize such forfeited property, under section 3166 and 3460 of the Revised Statutes. Why the circuit court of appeals should have limited the question as to *seizure* (if such is the true construction of its language) to section 3456, which provides for the *forfeiture* when the right of seizure is sustained by other sections referred to, we are at a loss to understand. Nor can we see the relevancy of the request for an answer, from this honorable court, as to the question of seizure under the decisions hereinbefore referred to of *Wood* v. *The United States* (16 Peters, 359), and *United States* v. *508 Barrels of Distilled Liquor* (3 Blatch., 410), as under these decisions, the court, acting by consent in lieu of a jury, could not have been called on to pass upon the question of *seizure*.

Clause 3 of paragraph 10 of the act of 1897 provides no penalty for its violation. This frequently occurs in the legislation of Congress, but it has seldom given rise to any difficulty as there have been found general provisions to meet such omissions. The penalty in this case would have been determined by section 3363 of the Revised Statutes but for the limitation contained in that section. It provides:

> No manufactured tobacco shall be sold or offered for sale *unless put up in packages* and stamped as *prescribed by law*.

The limitation found in the latter part of the section, however, limits the penalty to offenses of violations of

the provision found in *chapter 6* of title "35, internal revenue." The amendment made in the act of 1897 (now spoken of as the third clause of the tenth section) amends section 3394 of the Revised Statutes found in "title 35, internal revenue, chapter 7." For this reason the Government has relied upon the penalty of forfeiture as coming within the spirit and language of section 3456, which imposes a penalty for doing *anything by this title prohibited*, which language embraces all violations of the provisions of the statute included within the "*title 35, internal revenue.*" It provides as follows:

> If any distiller, rectifier, wholesale liquor dealer, or manufacturer of tobacco or cigars shall knowingly or willfully omit, neglect, or refuse to do or cause to be done any of the things required by law in the carrying on or conducting of his business, or shall do anything by *this title* prohibited, if there be no specific penalty or punishment imposed by any other section of this title for the neglecting, omitting, or refusing to do or causing to be done the thing required or prohibited, he shall pay a penalty of one thousand dollars; and if the person so offending be a distiller, rectifier, or wholesale liquor dealer, all distilled spirits or liquors owned by him or in which he has an interest as owner, and if he be a manufacturer of tobacco or cigars, all tobacco or cigars found in his manufactory, shall be forfeited to the United States.

The agreed statement of facts shows that these "coupons or vouchers" were packed in each of the

packages seized "when it was packed in the manufactory and prepared for sale" (Record, 2); that it had been the practice and custom of manufacturers of smoking tobacco to include such coupons in said packages (Record, 2, 3); that there had been "frequent complaints made to the Government by private persons or corporations who were interested in the *discontinuance by the defendant* and others of the use of said coupons" (Record, 15); that "because of the insistence by private persons or corporations who were interested in the *continuance by the defendant and others of the use of said coupons*" this seizure of property and information was made (Record, 15); that the defendant claimed to be the owner of the tobacco seized (Record, 1); that the collector was *specially authorized* by the Commissioner of Internal Revenue to seize the articles or things mentioned in the information.

It needs no argument to show that, under the law, no one but a manufacturer could pack within these sealed packages the coupons set out in the information; nor could interested parties desire the "*discontinuance by the defendant* of the use of said coupons" unless he was a manufacturer; nor could other persons or corporations be interested in the continuance by the "*defendant in the use of the coupons*" unless he was the manufacturer of the tobacco seized.

The facts admitted in the case agreed bring the case clearly within section 3456, which declares the penalty of forfeiture of this tobacco. The property being forfeited, the right to seize the same is found in sections 3166 and 3460 of the Revised Statutes.

The principle decided in the case of *United States* v. *Two Hundred Barrels of Whisky* (95 U. S., 571), in which the court was passing upon a similar statute enacted in 1868, will be found to govern and control the penalties for a violation of section 3394, as amended by the third clause of the tenth section of the act of 1897. Chief Justice Waite, in delivering the opinion of the court, on page 574, in speaking of what was then section 96 of the act above referred to, said:

> Section 96 was, however, undoubtedly intended to impose upon rectifiers and wholesale liquor dealers the duty of doing, or causing to be done, everything pertaining to their respective occupation which was necessary, in order to enable others acting under the law to do what was required of them. If they failed in this, and there was no other penalty provided for the neglect, they were subjected to the provisions of that section. If, however, by any other section a specific duty was imposed upon them, which, if performed, would enable the other parties to act in the proper manner, and a penalty was prescribed for the omission to perform such duty, they were not to be proceeded against under section 96. It was not intended by Congress to add, in that section, to the already existing penalties for an offense, but to provide for omitted cases only.

The court in the case cited, clearly announces the principle which should control in the case now before the court: That where no specific penalty is prescribed for the doing or the omission to do a particular thing,

the punishment should be controlled by the general provision. In this case Congress has affixed no specific penalty for the violation of section 10. Section 3363, we believe, can not be relied upon, as the offense is not included in the sixth chapter of the thirty-fifth title. Section 3456, found under the head of title 35, internal revenue, embraces in its scope section 3394, as amended by the tenth section of act of 1897, it being part of said "title."

The evidence hereinbefore referred to certainly presents a case of probable cause, and sufficient on which to rest the judgment of the court if not contradicted by any evidence in the record. And if such evidence existed it was the duty of the plaintiff in error to present it to the court below. This has not been done.

Wood v. *The United States*, 16 Peters, 336;
Cliquot's Champagne, 3 Wallace, 143, 4;
United States v. *508 Barrels Distilled Spirits*, 5 Blatch., 410.

JAMES M. BECK,
Assistant Attorney-General.
CHARLES J. FAULKNER,
Special Counsel for Government.

O